

# EXHIBIT MMM



"Timothy J. Hogan"  
 <tjh@loio.com>  
 08/11/2005 04:01 PM

To "Damian Capozzola" <dcapozzola@kirkland.com>  
 cc "Eric Liebeler" <eliebeler@kirkland.com>, "Lex Smith"  
 <lex@gte.net>  
 bcc  
 Subject RE: Outstanding Discovery from 2003 and 2004 - Highly Confidential-Attorney's Eyes Only

### Documents in the After Files -Highly Confidential-Attorney's Eyes Only

#### Counsel:

In a review of materials on my system I have come across the attached files that were obtained in the Guidance After files that had been inadvertently missed when I deleted the other After files. Because these might not be construed to be within the class of files I retained per my letter of June 20, 2005, I am advising you that I have found them. They show the F-1 program was directly focused on Mr. Berry's system that, by this time, was already an illegal unlicensed derivative. We have previously identified the following contributors to the F-1 project:

- SAP
- Manugistics
- EXE
- E3
- TCI

I have also identified specific SAP materials in the Guidance Before lists and the attached file shows Manugistics' role in the Fleming freight operations.

I request that you produce the F-1 materials immediately.

Here is the redline of these Ernst & Young created documents showing the F-1 relation to Mr. Berry's work:

• The Hawaii division hasuses a MS Access DBdata base that generates many of the reports and sets the timetable for placingreceiving orders. It keeps track of things like tariffscosts of a shipment including in haul charges, ocean freight and truckers charges

o PO number, product description, item, arrival date is entered into the DB from EDI information out of FOODS using a custom-programspecial interface.

- Any updates to the tariff tablesfor changing tariffs must be made by hand
- The functionality of this DB must be reproducedmatched or improved in the F1 solution
  - o There may be Cannot copy some pieces of existing system due to licensing issues to consider

Please advise me immediately if you will voluntarily produce the materials.

Thank you,

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Timothy J. Hogan  
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**From:** Damian Capozzola [<mailto:dcapozzola@kirkland.com>]  
**Sent:** Saturday, May 28, 2005 12:21 PM  
**To:** Timothy J. Hogan  
**Cc:** Eric Liebeler; Lex Smith  
**Subject:** RE: Outstanding Discovery from 2003 and 2004

1. After some investigation I understand that the F-1 project was an effort to replace Fleming's existing hardware and software with "best of breed" replacements in each of the functional areas of the company, and to allow the functional systems (such things as purchasing, inventory management, accounts receivable, etc.,) to talk to each other through the use of a "middleware" system that would link them together. The Berry system was never contemplated to be one of these systems; in fact it is my understanding that you and Mr. Berry have repeatedly made the point that the Berry system was supposed to be phased out. Accordingly, we believe that discovery on this topic is not reasonably calculated to lead to the discovery of admissible evidence and that, even were that not the case, any such connection to admissible evidence is so thin that the burden or expense of such discovery outweighs its likely benefit.

2. We believe the Order speaks for itself and these issues have already been decided.
3. After our summary judgment papers are in we will give this discovery issue our full attention. We believe the issue can wait until then given that the indemnity has no bearing on the matters the parties are briefing on summary judgment.

Thank you for your attention to these matters.

--Damian Capozzola

"Timothy J. Hogan" <tjh@loio.com>

05/25/2005 04:34 PM

To "Damian Capozzola" <dcapozzola@kirkland.com>

cc "Eric Liebeler" <eliebeler@kirkland.com>, "Lex Smith" <lex@gte.net>

Subject RE: Outstanding Discovery from 2003 and 2004

Mr. Capozzola:

1. F-1 was an initiative to modernize the Fleming IT. It was widely touted to be dealing with both inbound and outbound freight. Berry's system was designed for inbound but could be used for both. I've attached the excerpt from your firm's time records to assist you in your search for the records. If you require more, please advise me immediately.
2. We don't believe that the order meant to prevent our discovery of other sources of proof that have already been created and shared with numerous third-parties. These records can corroborate or refute your showing when you attempt to meet your burden in regard to profits etc. In any event they will also contain disclosure regarding the ongoing Berry litigation and matters unrelated to financials and are relevant and discoverable. Will you produce them?
3. Please advise me when you will produce these long overdue documents. If any are being withheld on privilege please provide a log. I reserve the right to seek additional documents. Please advise me when you will produce these long overdue documents. If any are being withheld on privilege please provide a log.

Thank you,

Tim Hogan

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**From:** Damian Capozzola [mailto:[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)]  
**Sent:** Wednesday, May 25, 2005 10:28 AM  
**To:** Timothy J. Hogan  
**Cc:** Eric Liebeler; Lex Smith  
**Subject:** Re: Outstanding Discovery from 2003 and 2004

Mr. Hogan:

With regard to Topic 1, can you please remind me what you understand the F-1 Project to be and your basis for that understanding?

With regard to Topic 2, the Master has already ruled that you are (or, more precisely, your expert is) only entitled to documents bearing on the Hawaii division for the period April 1, 2003 to the present. See attached Order, paragraph 1. The PCT already sent Mr. Ueno the financials for the Hawaii division covering April 1, 2003-August 23, 2003. I understand that C&S is gathering documents but you should deal with Mr. Smith in that regard.

With regard to Topic 3, my recollection is that when we met and conferred on this issue a little while ago we had reduced these requests to communications between Fleming and C&S concerning the indemnity and/or specifically referencing the Berry software. We are gathering relevant materials on these subjects.

--Damian Capozzola

"Timothy J. Hogan" <tjh@loio.com>

05/24/2005 10:50 AM

To "Damian Capozzola" <[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)>

cc "Eric Liebeler" <[eliebeler@kirkland.com](mailto:eliebeler@kirkland.com)>, "Lex Smith" <[lex@gte.net](mailto:lex@gte.net)>

Subject Outstanding Discovery from 2003 and 2004

Dear Mr. Capozzola:

I have still not heard your possition on the following long outstanding discovery:

1. F-1 Project materials. See Berry Third Request No's 1 and 2.
2. Financials Produced to potential bidders for Fleming Wholesale business. See Berry Second Request No.s 3, 14, 18 and 19.
4. C&S Correspondence related to Berry. See Berry Second request No.s 15, 17, 20 and 22.

If you are not going to produce this material immediately please advise me of your basis for withholding it so that I may present the matter to the Discovery Master without delay.

Tim Hogan

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Timothy J. Hogan  
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